IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1899.

The Consolidated Canal Company,
Appellant.

vs.

The Mesa Canal Company,
Respondent.

BRIEF OF JOHN D. POPE, *Attorney for Appellant.*

STATEMENT OF THE CASE.

The Consolidated Canal Company brought an action against the Mesa Canal Company to restrain it from building a dam in its canal by which the water was raised and backed up against a waterfall which had been created by the Consolidated company and was being used to operate a water wheel and mill for the grinding of grain. The fall of the water was for the distance of about five feet and it was the mechanical equivalent of forty horse power. The court in which the action was brought refused the injunction; the Supreme Court of Arizona affirmed the decree of the lower court and plaintiff appealed to this court.

The facts of the case are few and simple and they are fully set forth in the findings of fact, commencing at page 202, folio 378 of the transcript. The Mesa company owned a canal which took water out of the Salt river, in Maricopa county, Arizona, and conducted it to the lands of the stockholders in and around Mesa city. The water was used for domestic and irrigation purposes. A. J. Chandler entered into a contract with the Mesa company, dated January 10th, 1891, under which he and his associates and assigns were given "the right and privilege to enter upon any and all of the following portions of the said Mesa canal * * * for the purpose of widening and enlarging and increasing the size and capacity of the said Mesa canal between the point in Salt river, where the water is now, and may hereafter be taken out for said canal and a point on said canal known as Ayers' headgate, and enlarge and increase the size and dimensions of the main dam and headgates at the point of commencement of said canal in Salt river, and enlarge and increase the size and capacity of said Mesa canal, so that the same, when so enlarged and increased in size, shall have a carrying capacity, in addition to its present carrying capacity, not exceeding forty thousand inches of water, miners' measurement. * * * The present carrying capacity of the said Mesa canal for the purposes of this agreement, shall be 7000 inches, miners' measurement." [Folio 381.] The contract further provides that: "Said enlargement shall be made without in any way interfering with any of the rights, titles, interests or priviliges of the said party of the first part (the Mesa company) in and to the said canal, and the water flowing through the said canal, except as hereinafter provided." [Folio 381.] The contract goes on to provide that: "The management and control of the canal between the point known as Ayers' headgate, to, and including the dam in Salt river when so enlarged, as aforesaid, shall be in the party of the second part (Chandler), his heirs associates or assigns, provided that the said party of the second part, his heirs, associates or assigns shall, before he or they are entitled to use any water through said canal, first deliver to the party of the first part, their heirs or assigns, at a point in said Mesa canal known as Ayers' headgate, and shall continue to deliver the 7000 inches of water, miners' measurement, above expressed as the carrying capacity of the said Mesa canal, or such portion thereof as may be apportioned to said Mesa canal by the decree of any court." [Folio 383.] The contract contains this further provision: "Provided, further, that if the said party of the second part, his heirs, associates, or assigns, shall neglect to deliver water as agreed herein, or shall fail to carry out any of the terms of this agreement, and shall be notified by the directors of the said Mesa Canal Company of such failure or neglect to carry out the terms of this agreement and

shall still neglect to carry out the terms of this agreement for the period of ten days thereafter, or in such case as a break in the canal, headgates or dam whereby the water is turned out for a period of five days, then, and at all such times, it is hereby agreed by the said party of the second part, his heirs, associates, and assigns, that the directors of the Mesa Canal Company shall have the right and power to take full charge and control of said enlarged portion of said Mesa canal without process of law, and the same shall become the property of the said Mesa Canal Company and shall so remain until the said party of the second part, his associates, heirs, or assigns, shall fully comply with the terms and requirements of this agreement, and shall then revert back to the party of the second part, his associates, heirs or assigns, and shall be and remain in the said party of the second part, his heirs or assigns, so long as the terms of this agreement shall be by them complied with." [Folio 384.]

The court found that by consent of the contracting parties the place known as the division gates was substituted for "Ayers' headgate" as the point where the water was to be divided and the portion belonging to the Mesa Canal Company delivered to it. [Folio 386.]

Chandler's rights under the foregoing contract were transferred by him to the Consolidated Company, and it took possession of the Mesa canal and enlarged and reconstructed it down to the place of the division gates. The grade of the canal was changed in such manner as that a water fall was created at the division gates, measuring five feet and equivalent to forty horse power. This water power was created by the water which the Consolidated Company discharged through its division gates into the Mesa canal, the water wheel being turned by the water before it reached the Mesa canal. The expenses of the reconstruction of the canal and of creating the water power was borne by the Consolidated Company, which was at all times in full possession of the canal and of the water until it reached the old Mesa canal below the division gates. [Fol. 386 *et seq*]

There were certain lands near the division gates which could not be irrigated from the old Mesa canal because of their higher elevation, and the Mesa Canal Company had never attempted to irrigate these lands; but when the Consolidated Canal Company had taken possession of the old Mesa canal and reconstructed it down to the division gates in such manner as to raise the water five feet above the level of the old Mesa canal, thereby creating the water power above mentioned, the Mesa Canal Company conceived the idea of taking advantage of the work and expenditure of the Consolidated Company and put a dam across the Mesa canal below the division gates so as to raise the water level three and one-half feet, thereby causing it to flow out and along a latteral ditch, which it constructed for the purpose, and

to reach lands that had never been within the flow of the Mesa canal. This destroyed the water power and compelled the Consolidated Company to apply for an injunction.

The injunction was denied, and the territorial supreme court affirmed the degree of the lower court.

Alleged Error in the Decree.

The sole errors alleged are that an injunction should have been granted, and that the supreme court of the territory erred in affirming the decree of the lower court.

Argument.

The opinion of the supreme court of Arizona is in the transcript, commencing at folio 462. From this opinion it appears that the action of the trial court was affirmed because, in the opinion of the territorial supreme court, the water power destroyed was not within appellant's canal; and also because "the destruction of the use of the water to turn the wheel" was not a "destruction of, or interference in, the use of water which appellant was entitled to receive and use." The language of the court on this point is as follows: "By a dam erected on its own property, the appellee is raising the water to the elevation that will enable it to use such water to cover lands that could not be irrigated at the former elevation. The destruction thereby of the water power would entitle the appellant to relief if the water power destroyed was one within the appellant's canal, or if the destruction of the use of the water to turn the wheel was destruction of, or interference in, the use of water which appellant was entitled to receive and use; but the evidence in the case discloses the fact that the water attempted to be used to produce the water power is the 7000 inches which, under the terms of the agreement, the appellant is obliged to deliver to the appellee before the appellant is entitled to reeeive or use any water through the enlarged canal." [Fol. 367] The idea of the court is that the waterfall is not in appellant's canal; if it were, appellant would be entitled to an injunction. The further idea of the court is that the waterfall consists of the drop, from the division gates of the appellant into the Mesa canal, of the 7000 inches of water which the Mesa Company is entitled to receive before appellant is entitled to use any water under contract; that the use of said 7000 inches of water to turn a water wheel before it is delivered into the Mesa canal is an invasion of the property rights of the Mesa Canal Company. If it were not for these two facts, says the court, appellant would be entitled to relief.

Is it true that the waterfall is not within appellant's canal? And is it also true that the Mesa Canal Company has such an exclusive property right in the 7000 inches of water that

appellant cannot use the water to turn a wheel for mechanical purposes while it is dropping from appellant's canal into the canal of the Mesa Company? The contract between the Mesa Company and Chandler does not provide in direct language where the legal title to the old Mesa canal from the river down to the division gates shall be, but it does provide that Chandler, his associates, heirs or assigns shall have the right and privilege of entering upon the canal and reconstructing it down to a certain point; that he and they shall have the management and control of the canal between those points, and shall deliver to the Mesa Canal Company at the lower end of the reconstructed canal 7000 inches of water. After this comes the provision that in case of failure to deliver the water "the Mesa Canal Company shall have the right and power to take full charge and control of said enlarged portion of said Mesa canal without process of law, *and the same shall become the property of the Mesa Canal Company*, and shall so remain until the said party of the second part, his associates, heirs or assigns shall fully comply with the terms and requirements of this agreement, and shall then *revert back* to the party of the second part, his associates, heirs and assigns, *and shall be and remain in the party of the second part*, his heirs and assigns so long as the terms of this agreement shall be by them complied with." The right to take possession of the canal down to a certain point, to reconstruct it, to control and manage it, followed by a provision that in case of the failure to comply with certain terms the canal shall become the property of the first party, and then when the terms are again complied with, the title shall revert back to the second party, clearly means that the title to the canal is in the second party subject to the condition mentioned. The territorial supreme court seems to have taken that view of the contract, for otherwise it would not have been appropriate to say that appellant would have been entitled to an injunction if the waterfall had been "within the appellant's canal." The court must have understood that appellant had a canal in which the waterfall might have been placed. Besides, in finding IV, folio 386, this language occurs: "The elevation of the grade at the point where the division gates were located was about five feet above the grade at that point *on the canal formerly owned by the appellee.*" Upon this idea, if the fall had been placed above the division gates, and if the division gates had been placed upon the level of the old Mesa canal at the point where the water is delivered, appellant would have been entitled to an injunction; but because the waterfall is from the division gates into the Mesa canal, it is, therefore, outside of appellant's canal and appellant has no right to the water power. The findings of fact made by the court do not contain a particular description of the division

gates, but finding VII, folio 387, is as follows: "Upon the construction of the division gates at the point named, the appellant delivered the water to appellee at the division gates, thereby securing a waterfall in the water thus delivered." Finding IX, folio 387, speaking of the waterwheel and mill for grinding grain, says that appellant "*had erected them at the division gates, so that the wheel was turned by the water as it fell from the division gate into the Mesa canal, a distance of about five feet.* Afterwards appellee increased the height of the dam that it had formerly built to such an extent that it raised the surface of the water and backed the same up against the division gate in such manner as to destroy three and a half feet of the five-feet fall, and totally destroyed the water power." The finding then goes on to say that the water that was raised by the dam of the Mesa Canal Company "is the 7000 inches of water which appellant is obliged, by the terms of the agreement aforementioned, to first deliver to the appellee before said appellee is entitled to receive or use any water through said canal." The division gates, as the name implies, consist of a structure where the water in the canal of the appellant is divided so as to give the Mesa Canal Company the amount to which it is entitled. At folio 92 the engineer in charge of the division gates at the time of the trial, and at folio 99, the engineer who constructed them, gave descriptions of the division gates, from which it appears that the structure is about twenty-four feet wide; that the water drops to the lower level on what is called the apron nearer the upper than to the lower side of the structure; that is to say, the drop is from fourteen to eighteen feet from where the Mesa canal commences. But if this had not been so, it is impossible to understand how it would have made any difference, for, if the drop had been at the extreme lower end of the structure, still the drop in the water was obtained by means of the money and labor of the appellant in the reconstruction of the canal, which finding VI, folio 386, says was done "to secure through the enlarged canal a flow of water for irrigation and for other purposes for itself and patrons;" and finding VII says that "upon the construction of the division gates at the point named, the appellant delivered the water to appellee at the division gates, thereby securing a waterfall of five feet in the water thus delivered." The water which, under the contract, the Mesa Canal Company is entitled to receive, is on its way not only while it is flowing along appellant's canal, but while it is passing through appellant's division gates, and while it is dropping upon the floor constituting the lower portion of the division gates and until it is discharged into the Mesa canal. If appellant had the right to use it at any point, it had the right to use it wherever it saw fit, until it had come into the actual possession of the Mesa Canal Company. The water is within appellant's canal

and under its control at any and every point until it is actually delivered into the Mesa canal. This is so obvious that it admits of no discussion.

It is equally clear that the supreme court of the territory was wrong in attaching any importance whatever to the fact that the water which turned the wheel of appellant is the same water which appellant is under contract to deliver to the Mesa Canal Company. The language of the contract, found at folio 383, is that: "The party of the second part, his heirs, associates or assigns, shall, before he or they are entitled to use any water through said canal, first deliver to the party of the first part * * * 7000 inches of water," etc. The Mesa Canal Company distributes and uses water for domestic and irrigation purposes. This use of the water consumes it so that it cannot be made subject to further appropriation. Appellant is carrying water not only for domestic and irrigation purposes, but for other purposes, namely, the development of mechanical power to operate machinery, etc. Now, it is obvious, that what the contract meant to provide for was the securing of 7000 inches of water to the Mesa Canal Company, and to prevent any use of that water by the appellant for domestic or irrigation purposes which would deprive the Mesa Canal Company of a portion of the water to which it was entitled. To run the water over a wheel without consuming it is not to use the water within the meaning of the contract. It would make no difference whatever if the water should be run over a dozen wheels before reaching the Mesa canal. The word "use" in the contract is to be taken in the sense of "consume." The use of water by the Mesa Canal Company means its consumption because it is used for domestic purposes or for irrigation, and that is the sense in which the company employs the word when it puts a restriction upon Chandler and his assigns. The Mesa Canal Company is entitled to receive the full 7000 inches of water before the appellant has a right to consume any; appellant is entitled to consume only what is in excess of 7000 inches. But running the water over a wheel to develop mechanical power does not consume it, does not injure it in the least, and does not prevent its delivery to the Mesa Canal Company. It is a plain mistake as to the meaning of the contract to construe the language "before he or they are entitled to use any water through said canal" as meaning that the water shall not be required to do duty for mechanical purposes before it is subject to consumption for domestic uses and for irrigation. In one part of its opinion the court plainly concedes this, for it says that appellant would be entitled to relief "if the water power destroyed was one within appellant's canal." This clearly means that appellant has a right to use the water for mechanical purposes notwithstanding the fact that it is afterwards to be delivered to the Mesa company.

But apart from anything that was said by the supreme court of the territory in its opinion, we respectfully submit that appellant was clearly entitled to an injunction. The argument leading to this conclusion rests upon four propositions:

1. The 7000 inches of water which appellant is under contract to deliver to the Mesa Canal Company does not become the property of that company until it is actually received into that part of the canal which is in the possession and control of the company.

2. The water is subject to a second appropriation and may be used before delivery for any purpose that will not cause a material diminution in its quantity or deterioration in its quality.

3. After such second appropriation, the Mesa Canal Company, the first appropriator, had no legal right to change the place or manner of use of the water so as to injuriously affect the second appropriation.

4. For a change in the place and manner of use injuriously affecting the rights of the second appropriator, injunction is the proper remedy.

That part of the old Mesa canal which was given into the possession of appellant and which was reconstructed by it and is to remain in its exclusive management and control until default in the delivery of water, is the property of appellant. It is the Consolidated canal and not the Mesa canal. The provision that the reconstructed part of the canal shall become the property of the Mesa Canal Company in case of default as to the delivery of water, and remain the property of that company until appellant shall resume the delivery of water as agreed, and then to "revert back" to appellant, clearly shows the understanding of the parties as to the ownership of the canal. But if this were not so, appellant certainly has the exclusive use of the canal and is entitled to all the benefits of that use until it makes default, and this is amply sufficient for the purposes of this appeal. The canal was reconstructed down to the division gates by appellant for the purpose of reaching and irrigating lands that the Mesa canal had never reached and had never attempted to reach or irrigate, as well as for the purpose of creating a water power which of itself is of very great value. Now it is well settled that an appropriator does not become the owner of the water which he appropriates until it is in his actual possession.

In Saint *v.* Guerrerio, 17 Colo 448, 453, it is said:

"Interference with the prior right of a party to the use of water for irrigation is unlike most private injuries on which relief may be had by injunction. Priority of right to the use of water from a natural stream is a right peculiar in its nature. A party entitled to such priority, unless he can show that he is entitled

to all the water of a natural stream, cannot in the nature of things, identify certain specific water as belonging to himself while the same is running in the natural channel. Being entitled only to a certain quantity of the water, less than the whole, it is only after a proper diversion of such quantity into his own separate ditch or lateral that the prior appropriator can be said to have title, in kind, to the specific water thus diverted."

In Kidd *v.* Laird, 15 Cal. 161, 180, we find this language:

"This court has never departed from the doctrine that running water, so long as it continues to flow in its natural course, is not, and cannot be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property; but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself. We are not called upon to determine the character of the property which the owner of a ditch has in the water actually diverted by and flowing in his ditch. With reference to such water, his power of control and right of enjoyment are exclusive and absolute, and it is a matter of little practical importance whether in a strict legal sense, it be or be not private property. In regard to the water of a stream, his rights, like those of a riparian owner, are strictly *usufructuary*, and the rules of law by which they are governed are perfectly well settled."

In Parks C. & M. Co. *v*, Hoyt, 57 Cal. 44, 46, Mr. Justice McKinstry, speaking for the court said: "Nevertheless, although such appropriator may be entitled to flow of the stream undiminished, the water in the stream *above his ditch* is not his personal property. The stream as yet flows in its natural course —a part of the realty. The appropriator certainly does not become the owner of the very body of the water until he has obtained control of it in conduits or reservoirs, created by art, or applied to the purpose of leading or storing water by artificial means." And in McGuire *v.* Brown, 106 Cal. 660, 669, it is said: "It must be remembered that the appropriator is not the owner of the 'very body of the water,' until it passes into the appliances he has provided for its reception."

It is true that the first appropriator of water is entitled to the exclusive use of it up to the amount embraced in his appropriation, but it is also true that the second appropriator can take out the water above as well as below the first appropriator, and can use it for any lawful purpose. The limit, and the only limit, which the law places upon the exercise of this right is that the second appropriator must not interfere with the use of the water by the first appropriator, to the extent of his appropriation. Section 175 of Kinney on Irrigation, says: "The rights of the prior appropriator being fixed by the extent of his appropriation others may locate on the stream, either above or below, and take

all the water there is left flowing in the natural channel, provided no interference with or injury of the rights of the prior appropriator is thereby caused. * * * In all controversies between prior and subsequent appropriators of water, the question is, has the use and enjoyment of the water for purposes for which the first appropriator claims it, been impaired by acts of the subsequent claimant?"

Black's Pomeroy on Water Rights, section 90, states the law as follows:

"A prior appropriation having been made on a public stream, the residue or surplus remaining of its waters, not embraced within the amount of such prior appropriation, may afterwards be appropriated, either above or below on the same stream by other parties, if no interference with the rights of the prior appropriator is thereby caused. The doctrine extends to and admits of a succession of such appropriators; and there is no limit to its operation except such physical limits as arise from the size of the stream itself and the amount taken by each claimant."

In Butte C. & D. Co. *v.* Vaughn, 11 Cal. 143, Mr. Justice Field, delivering the opinion of the court, said: "The first appropriator of the water of a stream passing through public lands in this state has a right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation. To this extent his rights go, and no further. In subordination to these rights, subsequent appropriators may make use of the channel of the stream as they think proper, and they may mingle with its waters other waters, and divert an equal quantity, as often as they choose. Whilst resting in the perfect enjoyment of their original rights, the first appropriators have no cause of complaint."

In Nevada Water Company *v.* Powell, 34 Cal. 119, Mr. Justice Sawyer, in discussing the rights of miners who had made successive appropriations of the waters of a stream, said: "If plaintiff's right was thus limited to the extent and mode of the actual appropriation, * * * then the defendants had a right to take up the mining claims on the stream above, and work them in any manner which would not encroach upon the rights of the plaintiff, as they were actually vested and enjoyed at the time of locating such mining claims."

In Hill *v.* Smith, 27 Cal. 476, the doctrine was stated as follows:

"In controversies between prior and subsequent appropriators of water, the question is, has the use and enjoyment of the water, for the purposes for which the first appropriator claims it, been impaired by acts of the subsequent claimant?"

In Atchison *v.* Peterson, 20 Wall, 507, Mr. Justice Field delivering the opinion of the court said:

"What diminution of quantity or deterioation in quality will constitute an invasion of the rights of the first appropriator, will depend upon the special circumstances of each case, considered with reference to the use to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant."

It should be borne in mind that the rules that govern the rights of the successive appropriators are the same, whether the appropriation is made for the purpose of mining or operating machinery. [See Basey *v.* Gallagher, 20 Wall, 670; and Ortman *v.* Dixon, 13 Cal., 33.]

In Black's Pomeroy on Water-rights, section 72, we find the following: "Of course the mere use of the water by another person, when its quantity is not thereby lessened nor its quality deteriorated, is no injury to a prior appropriator. If, therefore, A owns a ditch and has the right to divert the water of a certain stream by its means, and B subsequently takes water from the same stream at a place above the head of A's ditch and uses it for his purposes, but returns its back undeteriorated in quality in the stream before it would reach A's ditch, or even into the upper part of the ditch itself at a point before A has use for it, no injury is thereby done to A, and he has no cause of action against B therefor."

This is the precise point decided by the supreme court of California in Union Water Company *v.* Crary, 25 Cal. 504. And the same decision was made by the supreme court of the territory of Arizona in the case of Austin *v.* Chandler, 42 Pacific Rep. 483. The syllabus contains a correct statement of the point decided, and is as follows: "An injunction does not lie at the instance of a prior appropriator of the water of a river through an irrigation ditch, to restrain a subsequent appropriator further up the stream from diverting water from the river, and after using it turning it into complainant's ditch instead of returning it into the river above the opening of complainant's ditch, where it appears that the water is turned into such ditch above the point where it is to be used by complainant, and that complainant has the same quantity as he would have if defendant returned the part used by him into the river."

We think the proposition is clearly established that appellant had the right to bring the 7000 inches of water which it was under contract to deliver to the Mesa Canal Company to a

higher elevation, and to create a water power by the drop of the water into the Mesa canal. This is a second appropriation of the water, and is made in such manner as not to injuriously affect the Mesa Canal Company.

The placing of a dam in the Mesa canal so as to raise the water after delivery into that canal three and a half feet in order to cause it to flow out on lands that had never been irrigated from the Mesa canal,and which could not have been irrigated from that canal as the Mesa Canal Company had constructed it, is a distinct change of the place of use; and the law is that the first appropriator cannot change the place of use if he thereby injuriously affects a subsequent appropriator. As the authorities are uniform upon this subject, it will not be necessary to cite many of them. In Columbia Min. Co. *v.* Holter, 1 Mont. 296, it was held that where A appropriated the waters of a creek at a certain point in 1865, and B appropriated the same water above A in 1867, for the use of a mill, and returned the water into the creek so that A had the benefit thereof, it was held that A had no right to change the point of diversion of the water in 1869, and appropriate above B's mill, thereby depriving B of the use of the water. In Cole *v.* Logan, 24 Ore. 304, it appeared that two parties who desired to take all the water from a creek for the irrigation of their respective ranches, united and built a dam across the creek and diverted all the water, one taking a part and the other another part; and one of them allowed the waste water to flow back into the creek above the place where defendant had a ditch so that defendant obtained a certain amount of water which was sufficient to irrigate his lands. The defendant went above the dam and took out the amount of water necessary to irrigate his lands, thereby depriving plaintiffs of the use of it. Defendant was the prior appropriator, but the court held that he could not change the point at which he diverted the water so as to injure the subsequent appropriators. In the opinion it is said: "The defendant, having made the diversion of the water in 1871, could not thereafter change the point of his diversion if it injuriously affected the right of any subsequent appropriator."

In Butte T. M. Co. *v.* Morgan, 19 Cal. 609, it was held that a person appropriating and diverting water of a stream at a given point, cannot afterwards change the point of diversion to the prejudice of a subsequent appropriator.

In section 1541 of Kinney on Irrigation, it is said:

"But on the other hand the mode of appropriation, or point of diversion, cannot be changed by the first appropriator so as to interfere with the rights acquired by subsequent appropriators prior to the change. In section 69 of Black's Pomeroy on Water-rights, after stating the general rule as laid down in Kidd

v. Laird, 15 Cal. 161, that, after an appropriation has been made, the place and character of use may be changed, the author says the proper limitation upon this doctrine was stated in the subsequent case of Butte T. & M. Co. *v.* Morgan, 19 Cal. 609, which held that a party appropriating and diverting water at a certain point cannot afterwards change the place of diversion so as to prejudice another person whose rights have subsequently accrued."

In Union Mill & Mining Co. *v.* Dangberg, 81 Fed. Rep., at page 105, Judge Hawley, uses this language:

"When the right of complainant attached and became fixed, the the respondents could not in any manner encroach upon or interfere with it by afterwards extending and enlarging their own rights beyond their first appropriation, by the acquisition of additional land, and the construction of ditches or other means to convey additional quantities of water away from said river to any portion of their subsequently acquired lands. No rule of law is better settled, oftener applied, more rigidly enforced or based upon stronger principles of equity, justice, and right in regard to the beneficial use of water, and the rights acquired by a priority of appropriation. The right of the first appropriator is fixed by his appropriation, and when others locate upon the stream, or appropriate the water, he cannot enlarge his original appropriation or make any change in the channel, to their injury. Each subsequent locator or appropriator is entitled to have the water to flow in the same manner as when he located, and may insist that the prior appropriators shall be confined to what was actually appropriated or necessary for the purpose for which they intended to use the water. In other words, a person appropriating a water right on a stream already partly appropriated acquires a right to the surplus or residium he appropriates; and those who acquired prior rights, whether above or below him on the stream, can in no way change or extend their use of the water to his prejudice, but are limited to the rights enjoyed by them when he secured his." For this statement of the law the judge cites a long list of authorities, the last of which is Gould on Waters, section 231, where the doctrine is very clearly and forcibly stated.

Enough has been said to show that the raising of the water level in the Mesa canal to the destruction of the water power of the appellant was a clear violation of appellant's legal rights. It only remains to consider the question of the proper remedy.

It cannot be necessary to cite many authorities to the point that injunction is the proper remedy in cases like this. Gould on Waters, section 543, says: "Under the customs of miners, adopted in the mining states and territories and allowing priority of right to the first appropriator of a stream, which doctrine

has been extended by the courts to appropriations of streams flowing through public lands, for any beneficial use, an appropriator of such a stream, in whole or in part, will be protected by injunction in the enjoyment of that portion of the stream to which he is entitled, and to prevent wrongful acts acquring the appearance of right by lapse of time."

Beach on Injunctions, section 305 says:

"*Injury which is irreparable:* Where the injury complained of is such as to destroy plaintiff's property, or render it entirely worthless, for his purposes, it may properly be regarded as irreparable. And where the substance of plaintiff's estate or inheritance is taken in part, for example by the construction of a tunnel through his land, the injury is deemed irreparable without regard to defendant's solvency."

Kinney on Irrigation, section 332, says:

"The diversion of a water-course, or of water from those rightfully entitled to the use thereof, is a private nuisance. A person who has a clear right to a certain amount of water flowing in a stream by virtue of an appropriation of the same is entitled to protection against acts which materially diminish the quantity of the water to which he is entitled, or materially deteriorate its quality to such a degree that it injures it for the use to which he desires to apply it. Equity affords the appropriate remedy against the wrong doer by way of an injunction against such wrong." It is obvious that an appropriation of water for a mechanical use is entitled to the same protection as if it was intended for irrigation, and that an interruption of the flow of the water is substantially an interference with the rights of the appropriator.

Lyon *v.* McLaughlin, 32 Vt. 423, was an action brought for the invasion of the right to the use of the water course, which was threatened or intended. The court says:

"It would seem to be well settled, as shown by the text books and the cases, that when the invasion of a right in this kind of property is threatened and intended, which is necessarily to be continuing and operative prospectively and indefinitely, and the extent of the injurious consequence is contingent and doubtful of estimation, the writ of injunction is not only permissible, but is the most appropriate means of remedy. It affords, in fact, the only adequate and sure remedy; for the very doubtfulness as to the extent of the prospective injury, and the impossibility of ascertaining the measure of just reparation, renders such injury irreparable, in the sense of the law relating to this subject."

In Kimberly & Clark Co. *v.* Hewitt, 75 Wis. 371, 44 N. W. 303, it was held that:

"A complaint which alleges that defendants threatened to divert the water from plaintiff's water power, that defendants claimed the right and had the ability to do it, and that they will

do so unless restrained, presents a case for the exercise of equitable jurisdiction to prevent a threatened injury."

The City of Emporia *v.* Soden, 25 Kas. 410, is a very instructive case, and is directly in point here. The city of Emporia sunk a well from seventy-five to one hundred feet from the river, where Soden had a dam for the creation of water power to operate his mills. The object of the well was to provide water for the inhabitants of the city. At a depth of about twenty-five feet the well struck a stratum of gravel, which extended to the pond, and the water flowed in freely. In addition to this a pipe was put in from the pond to the well, to be used in cases of fire when the demand upon the well would be suddenly increased. Soden brought an action for injunction, which was granted, and the lower court was affirmed in an opinion written by Judge Brewer. In the opinion we find this language:

"Has the plaintiff any remedy for this direct and indirect abstraction of water, and consequent diminution in amount of power? The amount of water now used by the city, and its present effect upon the plaintiff's business, do not determine the question of right or remedy. The continuance of the water works, as well as the growth of the city, will increase the demand; and if the present abstraction can be sustained, there is no legal principle upon which the future and larger abstraction can be restrained. The fact is obvious that by means of the pipe running into the pond, there will be, in case of fire, a direct abstraction of water, and the fact is found that by means of the well there is an indirect abstraction. The flow of water is, as heretofore stated, thus interfered with, and the power diminished. It is in evidence that, while at certain seasons of the year the water supply is more than enough for all of plaintiff's present uses, and that during such seasons the consumption of water in the city would work no present injury, yet at other seasons the supply is insufficient, and some or all the mills are compelled to stop running. Hence, naturally, any abstraction of water would tend to increase the time during which his mills must be idle, and therefore work present and positive injury—an injury increasing with the increasing consumption by the city. Further, if plaintiff is entitled to this water power at all, he is entitled to all of it, and may increase the number of mills, or amount of machinery propelled by it, until his uses shall wholly exhaust it, so that matters of amount really fade out of sight, and the question is one of right and title."

There are many decisions in California to the same effect. In Richards *v.* Dower, 64 Cal. 602, it was held that:

"The solvency of a person who is about to construct a tunnel through the land of another does not affect the right of the latter to an injunction. The injury would be irreparable in its nature."

In Moore *v.* Clear Lake Water Works, 68 Cal. 146, the syllabus is as follows:

"In an action to restrain the diversion of water from a stream, the complaint alleged that the plaintiff was the owner and in possession of a certain ditch connected with the stream, and that he had a right to appropriate for use and distribution so much of the water of the stream as the ditch had capacity to carry. Held, that an allegation to the effect that the plaintiff was in a position to use or distribute the water was unnecessary.

"In such an action, where the plaintiff complains of a continuous wrongful act and consequent infringement of his rights, an injunction will be granted, although there is no allegation or proof of actual damage."

In Spargur *v.* Heard, 90 Cal. 222, it was held that:

"In order to sustain an injunction restraining the diversion of water belonging to the plaintiff, it is not necessary that any actual damage by reason of the diversion should be alleged, or proved, or found, and a failure to find upon the issue as to the extent of actual damage is immaterial if no damages are granted.

"Where it appears that the plaintiff has acquired a right to appropriate the waters of a stream as against the defendants, who are lower riparian owners, and that the defendants have wrongfully obstructed the flow of water into the plaintiff's ditch and threatened to continue to do so, the plaintiff is entitled to a perpetual injunction, without proof of damages."

And in the very next case, Mott *v.* Ewing, 90 Cal. 231, it was held that:

"Where the facts found show that, if not prevented, the continuous trespass of the defendants might by time ripen into a right adverse to the plaintiff, the plaintiff is entitled to an injunction to protect the superior right without proof or finding of damages, and the failure to find upon an issue tendered, as to damage resulting from the trespass, is immaterial, if no damages are given by the judgment."

Cresent City W. & L. Co. *v.* Simpson, 77 Cal. 286, was an action brought to enjoin defendants from removing certain moorings, anchors and buoys which were appurtenant to a wharf of which the plaintiff was lessee. One of them had been removed by the defendants and the removal of others was threatened. The court held that an injunction was the appropriate remedy, and announced these principles:

"When an injunction is sought to restrain irreparable injury to the inheritance, from a trespass threatened in the nature of waste, the complaint need not allege the insolvency of the defendant."

In Noonan *v.* Albany, 79 N. Y. 470, it was held that a riparian owner was entitled to an injunction restraining a lower appropri-

ator from interfering with the flow of the water in a stream and to compel him to remove any obstructions he had placed in the channel of the stream by which the water had been thrown back on the plaintiff's land.

In U. S. F. L. & E. M. *v.* Gallegos, 89 F. R. 769, 773, Judge Thayer said: "A suit in equity is generally the only adequate remedy for trespasses continually repeated, because constantly recurring actions for damages would be more vexatious and expensive than effective. 2nd Beach on Inj. Sec. 1129, 1146; Tallman *v.* Railroad Co., 121 N. Y. 119, 123, 23 N. E. 1134; Uline *v.* Railroad Co., 101 N. Y. 98, 122; 4 N. E. 536; Galway *v.* R. R. Co., 126 N. Y. 132, 145; 28 N. E. 479."

In Stone *v.* Lumber Co. 59 Mich. 24; 26 N. W. 216, it was held that an injunction would lie to prevent the flooding of plaintiff's land, if it appeared that the threatened injury is of a character to render the property comparatively worthless for the purposes to which it was best adapted, and for which it was intended by the owner, without regard to the amount of immediate damage sustained.

Bemis *v.* Upham, 13 Pick. 169, was a case where an injunction was sought to prevent the keeping up of a mill dam which set the water back so as to overflow the plaintiff's dam higher up. It was admitted by the defendant in that case that the grievance complained of was a nuisance, but it was objected that there was a adequate and complete remedy at law. The court held that a decree in equity was the only sufficient remedy inasmuch as such decree could extend to all parties having an interest, and bind them, effectually forever.

Citations upon this point might be extended indefinitely, but the foregoing ought to be sufficient. The remedy by injunction is in universal use in the Pacific states and territories where irrigation is practiced to settle disputes respecting adverse claims to water, and it is not believed that counsel for appellee will make any contention as to the remedy.

Respectfully submitted,

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